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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JASON MCCORD PATTEN, Defendant and Appellant.	A150771 (Lake County Super. Ct. No. CR943917)

Jason McCord Patten pled no contest to possession of methamphetamine, and the trial court placed him on probation. As conditions of probation, the court imposed criminal laboratory analysis and drug program fees, criminal conviction and court operations assessments, and a criminal justice administrative fee. The court also ordered Patten to pay restitution. On appeal, Patten argues the court erred in ordering these payments. We modify the sentencing order regarding the assessments. In all other respects, we affirm.

BACKGROUND

Patten was charged with one count of methamphetamine possession (Health & Saf. Code, § 11377, subd. (a)) and was alleged to have served three prior prison terms (Pen. Code, § 667.5, subd. (b).) Patten pled no contest to possession of methamphetamine and admitted the three prison priors. On his plea form, Patten acknowledged the court would order him to pay restitution, a court operations assessment, a court facilities assessment, and base fines plus applicable penalties and assessments in amounts to be determined. Patten also acknowledged the form language

that he "must prepare financial disclosure statements to assist the court in determining [his] ability to pay[,] and refusal or failure to prepare the required financial disclosure statements [could] be used against him at sentencing[.]"

The court suspended imposition of sentence and placed Patten on three years' probation. The court imposed over 20 probation conditions, including a $50 criminal laboratory analysis fee plus a $155 penalty assessment (Health & Saf. Code, § 11372.5); a $150 drug program fee plus a $465 penalty assessment (Health & Saf. Code, § 11372.7); a $30 criminal conviction assessment (Gov. Code, § 70373); a $1,800 restitution fine; a $40 court operations assessment (Pen. Code, § 1465.8); and a $90 criminal justice administrative fee (Gov. Code, § 29550, subd. (c)). Patten's counsel did not object to any of these conditions, which he now appeals.

DISCUSSION

General Principles

"A trial court has broad, but not unlimited, discretion in setting the terms and conditions of probation. [Citations.] On appeal, we review the trial court's exercise of that discretion under the abuse of discretion standard. 'A condition of probation will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality. . . ." [Citation.]' [Citations.] All three factors must be present for a condition of probation to be invalid. [Citation.] Furthermore, '[i]nsofar as a probation condition serves the statutory purpose of "reformation and rehabilitation of the probationer," [citation] it necessarily follows that such a condition is "reasonably related to future criminality" and thus may not be held invalid whether or not it has any "relationship to the crime of which the offender was convicted." ' [Citation.] A trial court does not abuse its discretion unless its determination is arbitrary or capricious or ' " 'exceeds the bounds of reason, all of the circumstances being considered.' " ' [Citation.]" (*People v. Hughes* (2012) 202 Cal.App.4th 1473, 1479.)

Criminal Laboratory Fee and Assessment (Health & Saf. Code, § 11372.5)

Drug Program Fee and Assessment (Health &Saf. Code, § 11372.7)

Patten acknowledges the $50 criminal lab and $150 drug program fees related to reasonable probation conditions and thus were not collateral. But he contends actually *paying* these fees is improper because they were not oriented towards his rehabilitation and instead financed the "machinery of criminal justice." We disagree.

Health and Safety Code section 11372.5 provides that individuals convicted of certain drug offenses "shall pay a criminal laboratory analysis fee in the amount of fifty dollars ($50) for each separate offense." (Health & Saf. Code, § 11372.5.) Health and Safety Code section 11372.7, subdivision (a), provides in pertinent part, "[E]ach person who is convicted of [certain narcotics offenses, including a violation of Health and Safety Code sections 11370] shall pay a drug program fee in an amount not to exceed one hundred fifty dollars ($150) for each separate offense." (Health & Saf. Code, § 11372.7, subd. (a).) Fines and penalties imposed and collected by the courts for all criminal offenses are subject to penalty assessments. (See Pen. Code, § 1464, subd. (a)(1); Gov. Code, § 76000, subd. (a)(1).)

In *People v. Ruiz* (2018) 4 Cal.5th 1100 (*Ruiz*) our Supreme Court considered whether a criminal laboratory analysis fee and a drug program fee were part of the criminal punishment imposed for violating our drug laws. (*Id.* at p. 1107.) The court concluded that even though Ruiz was convicted of conspiracy to commit specified crimes, the laboratory analysis fee and the drug program fee were part of the punishment imposed for the target crimes and were correctly imposed on Ruiz. (*Id.* at p. 1122.) Although the court remanded the possible issue of whether the fees were subject to penalty assessments back to the court of appeal, in doing so it expressly disapproved a line of cases holding they were not subject to penalty assessments on the basis that the fees were not punishment. (*Id.* at pp. 1112-1113.)

Ruiz guides our consideration here. The laboratory fee and drug program fee were correctly imposed as part of Patten's statutory punishment for possession of methamphetamine in violation of Health and Safety Code section 11377. Accordingly,

they were proper conditions of his probation because both had a direct relationship to the offense, and there is no need for us to further analyze the possible relationship of the fees to his conduct or possible rehabilitation.

Patten's argument that requiring him to *pay* the fees somehow finances the "machinery of criminal justice" is frivolous, especially since these fees go towards financing *his* rehabilitation, as he fully acknowledges. The trial court did not err in imposing the criminal laboratory and drug program fees and assessments as probation conditions.

Criminal Conviction Assessment (Gov. Code, § 70370)

Court Operations Assessment (Pen. Code, § 1465.8)

The criminal conviction and court operations assessments are another matter. Patten contends the court erred by imposing the $30 criminal conviction and $40 court operations assessments as probation conditions. The People agree and so do we. These assessments should not be imposed as probation conditions because they were collateral to Patten's possession offense and not directed towards rehabilitation. (See *People v. Kim* (2011) 193 Cal.App.4th 836, 842.) We will modify the probation order to clarify that payment of these fees are imposed as separate orders and not probation conditions. (See, e.g., *Id.* at pp. 847-848.)

Criminal Justice Administrative Fee (Gov. Code, § 29550, subd. (c))

Patten does not dispute the trial court's authority to impose a criminal justice administrative fee as a probation condition pursuant to Government Code section 29550, subdivision (c). Rather, he argues the $90 criminal justice administrative fee was improper here because the court failed to first determine his ability to pay. He asks us to remand for an ability-to-pay hearing. We decline.

Under Government Code sections 29550, 29550.1, and 29550.2, a "criminal justice administration fee," also called a "booking" fee (*People v. McCullough* (2013) 56 Cal.4th 589, 592 (*McCullough*)), can be imposed for "reimbursement of county expenses incurred with respect to the booking or other processing of . . . arrested persons [who] are brought to the county jail for booking or detention." (Gov. Code, § 29550, subd. (a)).

Considerations that may apply in setting the amount of the fee include the defendant's ability to pay. (Gov. Code, §§ 29550, subd. (d)(2), 29550.2, subd. (a)). Government Code section 29950, subdivision (d)(2) states in relevant part: "When the court has been notified in a manner specified by the court that a criminal justice administrative fee is due the agency: [¶] . . . [¶] The court shall, as a condition of probation, order the convicted person, based on his or her ability to pay, to reimburse the county for the criminal justice administrative fee, including applicable overhead costs." (Gov. Code, § 29550, subd. (d)(2).)

In *McCullough*, the defendant challenged his booking fee due to the trial court's failure to determine his ability to pay. Our Supreme Court concluded his contention was forfeited. (*McCullough, supra*, 56 Cal.4th at pp. 590-591.) The Supreme Court held that "because a court's imposition of a booking fee is confined to factual determinations, a defendant who fails to challenge the sufficiency of the evidence at the proceeding when the fee is imposed may not raise the challenge on appeal." (*Id.* at p. 597.) The court reasoned that its review of statutes in which the Legislature has required a court to determine if a defendant is able to pay a fee indicated "that the Legislature considers the financial burden of the booking fee to be de minimis and has interposed no procedural safeguards or guidelines for its imposition.[1] In this context, the rationale for forfeiture is particularly strong." (*Id.* at p. 599.)

Patten's counsel did not object to the criminal justice administrative fee when the trial court imposed it. In addition, Patten's plea form expressed his understanding he would be subject to fines, penalties, and assessments and that his failure to prepare financial disclosure statements to assist the court in determining his ability to pay could be used against him at sentencing. Nothing in the record indicates he ever prepared any such disclosure statements. Under *McCullogh*, Patten's challenge to the criminal justice administrative fee is forfeited.

[1] Whether or not this expression of legislative policy still prevails, *McCullough* remains the rule of appellate forfeiture and controls our analysis.

Ineffective Assistance of Counsel

Patten argues trial counsel rendered ineffective assistance by failing to request an ability to pay hearing before the court imposed the $90 criminal justice administrative fee (Gov. Code, § 29550), and the $1,800 restitution fee (Pen. Code, § 1202.4). He also argues that that record showed that he did not have the ability to pay, and if his counsel had objected, "the court would have necessarily found that he did not."

To demonstrate ineffective assistance, Patten must show his trial counsel's representation fell below prevailing professional norms and he was prejudiced by that deficiency. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 (*Strickland*).) To show prejudice, Patten must show a reasonable probability he would have received a more favorable result had trial counsel's performance not been deficient. (*Ibid.*) " 'Surmounting *Strickland*'s high bar is never an easy task.' " (*Harrington v. Richter* (2011) 562 U.S. 86, 105.) Ineffective counsel claims are rarely appropriate for resolution in a direct appeal, in which they can succeed "only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

Patten first assumes an ability-to-pay hearing pertaining to the criminal justice administrative fee had to precede the court's order, but he provides no support for that contention. A booking fee under section 29950, subdivision (c) may be imposed so long as a court makes "a finding, whether express or implied, of the defendant's ability to pay" that is supported by substantial evidence. (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1400, disapproved on other grounds in *McCullough*, *supra*, 56 Cal.4th at p. 599.) In *McCullough*, *supra*, 56 Cal.4th 589, the Supreme Court observed that unlike many other statutes that condition the imposition of a fee on a defendant's ability to pay, section 29950 does not contain any "procedural requirements or guidelines" for the ability-to-pay determination, such as the right to a hearing on the issue. (*Id.* at p. 599.)

Thus, Patten cannot demonstrate trial counsel's failure to insist on a hearing prior to the trial court's imposition of probation conditions was objectively unreasonable.

Second, there is enough in the record to support an implied-ability-to-pay finding which would have provided counsel a valid reason for not objecting to the booking fee. Patten acknowledged in his plea form that the court would order him to pay certain fees and restitution and that his failure to prepare any financial disclosure statement could be used against him. While his probation report indicated that he had no monthly income and had $2,700 in credit card debt, it also contained information about Patten's employment history and financial status on which the court could have premised an implied ability-to-pay finding. He worked as a handyman since 1995 for the same employer. He was in good mental and physical health and was capable of performing physical labor. Further, the probation report recommended Patten maintain full-time, gainful employment while on probation. Patten himself expressed an interest in an outpatient drug rehabilitation program and a desire to continue working. This information could support an implied ability-to-pay finding. (See *People v. Ramirez* (1995) 39 Cal.App.4th 1369, 1377 [trial court's ability-to-pay determination may account for a defendant's future ability to pay].) Thus, the fact the court did not discuss Patten's ability to pay did not warrant an objection.

Nor was trial counsel ineffective for failing to request a determination regarding Patten's ability to pay the $1,800 restitution fine. Penal Code section 1202.4 requires the court to impose a restitution fine when the defendant is convicted of a crime. (Pen. Code, § 1202.4, subds. (a)(1), (b).) The statutory minimum restitution fine was $300, and the maximum was $10,000. (Pen. Code, § 1202.4, subds. (b)(1), (2).) "The court shall impose the restitution fine unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record. A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine. Inability to pay may be considered only in increasing the amount of the restitution fine in excess of" the statutory minimum. (Pen. Code, § 1202.4, subd. (c); see also *People v. Covarrubias* (2016) 1 Cal.5th 838, 935.) While the restitution here exceeded the

statutory minimum, the same considerations discussed above regarding Patten's capacity to work and future ability provided trial counsel a reasonable basis to conclude the amount of the restitution fine did not warrant an objection.

In light of these conclusions, we need not consider Patten's prejudice arguments.

DISPOSITION

The January 2017 judgment is modified to reflect the $30 criminal conviction assessment (Gov. Code, § 70373) and the $40 court operations assessment (Pen. Code, § 1465.8) as separate court orders, not probation conditions. The trial court is directed to prepare an amended abstract of judgment reflecting this disposition and to forward the amended abstract to the appropriate authorities. As modified, the judgment is affirmed.

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Siggins, P.J.

WE CONCUR:

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Fujisaki, J.

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Petrou, J.